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Nos. 80-1190 and 80-1193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED,
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS UNITED STEELWORKERS OF AMERICA, AFL-CIO AND LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO

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I. THE STANDARD OF REVIEW

In the Fifth Circuit the settled rule in discrimination cases is that the appellate court is to make an "independent determination," "free of the clearly erroneous rule," of the question whether the defendant acted with a discriminatory purpose. See USW Br. 30, 31 n. 41.[1]

In their briefs, neither respondents nor the Government disputes that that is the Fifth Circuit's rule; and neither even attempts to justify that rule. Rather, respondents argue that the Fifth Circuit found the district court to have "misapplied the pertinent legal standard" and that the court of appeals properly acted for *that* reason to make its own evaluation of the facts. R. Br. 144-146.[2] Respondents understand the law to be that

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[1] The Fifth Circuit has continued to apply that rule in numerous cases decided after the instant case and those listed at n. 41 of our opening brief. See, *e.g.*, *Robbins v. White-Wilson Medical Clinic, Inc.*, 642 F.2d 153, 154-155, n. 1 (CA 5 [Unit B] 1981), vacated on other grounds, 645 F.2d 252 (1981); *Marable v. H. Walker & Associates*, 644 F.2d 390, 395 (CA 5 [Unit B] 1981); *Joshi v. Florida State University*, 646 F.2d 981, 986 (CA 5 [Unit B] 1981), petition for certiorari filed, 50 USLW 3467 (1981); *Cousin v. Board of Trustees, Etc.*, 648 F.2d 293, 295-296, n. 3 (CA 5 [Unit A] 1981); *Castaneda v. Pickard*, 648 F.2d 989, 1001-1002 (CA 5 [Unit A] 1981); *Rohde v. K. O. Steel Castings, Inc.*, 649 F.2d 317, 320, n. 1 (CA 5 [Unit A] 1981); *C. W. Smith v. Farah Mfg. Co., Inc.*, 650 F.2d 64, 68 (CA 5 [Unit A] 1981); *Brown v. Sibley*, 650 F.2d 760, 766 n. 8 (CA 5 [Unit A] 1981); *Wilkins v. University of Houston*, 654 F.2d 388, 390 (CA 5 [Unit A] 1981); *Lindsey v. Mississippi Research & Development Center*, 652 F.2d 488, 492 (CA 5 [Unit A] 1981); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1147 (CA 5 [Unit A] 1981), petition for certiorari filed, 50 USLW 3176 (1981); *Jackson v. City of Killeen*, 654 F.2d 1181, 1184-1185 (CA 5 [Unit A] 1981).

[2] The Government takes a different tack, suggesting that it is possible to read the opinion below as applying the "clearly erroneous" rule and not the rule of independent determination of the facts established by the Fifth Circuit for cases such as this. To be sure, the Government is able to point to that court's invocation of the words of the "clearly erroneous" test—"the definite and firm conviction that a mistake has been made" (App. 15a); but under

if the district court had an erroneous view of the law, then Rule 52(a) no longer applies, the court of appeals is free to substitute itself as the original fact-finder (R. Br. 144-146), and the court of appeals' substituted fact-findings must stand unless *that* court "applied an improper legal standard" (*id.* 146). Respondents' contention fails for three reasons.

1. The district court did not commit any "errors of law," and the court of appeals did not suggest that the district court had done so. While respondents contend that the district court committed six such "errors" (R. Br. 145, n. 102; see also *id.* 148-149), upon examination

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the circumstances here that is not a sufficient basis for concluding that the court applied a scope of review other than that called for by the governing rule in the Fifth Circuit. Such a reading would mean that the court below did not follow the established rule of the Circuit as to the appropriate scope of review in precisely this type of case—a rule recognized, indeed quoted, in the opinion below. App. 15a, n. 6. And any ambiguity that might be raised by the words used by the court below is removed by examination of the method of review actually employed by that court in this case: the court made its own analysis of the facts and did not address the evidence supporting the district court's findings. See Union Br. 38-48. Moreover, where the Government lifts phrases from the court of appeals' opinion that might be consistent with a "clearly erroneous" standard, there are an equal number of such phrases pointing the other way. See, *e.g.*, App. 11a ("appear to be based"); *id.* 12a ("the evidence further indicates"); *ibid.* ("[t]he record evidence, generally, indicates"). Further, at the critical point in its analysis, when the court was stating its conclusions, it declared:

> The district court *might have* reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration . . .
>
> *We* consider significant in *our* decision [four enumerated factors]. Because *we find* that the differences in the terms, conditions and standards of employment for black workers and white workers resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) . . . [App. 16a (emphasis added)].

These statements are consistent only with the court's having conducted the "independent determination" it expressly stated was its responsibility.

it is clear that respondents' quarrel is with the *weight* accorded certain items of evidence by the district court in resolving the *factual* question whether the seniority system was motivated by race.[3]

2. With respect to one of these evidentiary matters—the IAM's motives—the district court expressly declined to make a finding, believing that as IAM had no role in negotiating USW's seniority system IAM's motives were not indicative of the motivation with which the system was negotiated. The court of appeals disagreed, and, without remanding, proceeded to decide on its own what the IAM's motives had been. Regardless whether the disagreement between the courts over the significance of the IAM's motives be regarded as a matter of weighing evidence (as we contend) or as a disagreement of "law" (as respondents contend)—and even if the court of appeals were right that resolution of this factual matter was important (but see USW Br. 47-48 and *infra* pp. 13-15)—the court of appeals had no business determining in the

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[3] The district court's "fail[ure] to consider the motive of the Machinists" (R. Br. 145, n. 102) reflected its belief that the motive of the IAM was not indicative of the motivation with which USW's seniority system was negotiated, as the IAM had not participated in those negotiations. The district court did not "fail[] to consider the degree of segregation fostered by the seniority system or its harm upon blacks" (R. Br. 145, n. 102), the district court considered those factors and found that on the facts of this case they were not so substantial as to compel an inference of discriminatory motivation in the face of other, more convincing evidence of innocent motivation (see USW Br. 19-20, 20a-22a). The district court did not "fail[] . . . to consider the racial consequences of changes in the seniority system after the November 1941 NLRB certification" (R. Br. 145, n. 102), the district court considered those consequences but found that there were more persuasive indices of innocent motivation for the changes (App. 32a-37a). The other three "errors of law" attributed by respondents to the district court are, by respondents' own articulation of them, simply quarrels that the district court should have accorded more weight to particular facts than that court thought warranted: "failed . . . to give '*due* consideration' to . . ."; "failed to consider *adequately* . . ."; "failed . . . to examine *fully* . . ." (R. Br. 145, n. 102; emphasis added).

first instance what the IAM's motives had been. The rule when a district court fails to resolve a factual dispute that the court of appeals deems critical was stated in *DeMarco v. United States*, 415 U.S. 449, 450 n.:

> [F]act finding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court. See, *e.g.*, *General Electric Credit Corp. v. Robbins*, 414 F.2d 208, 211 (CA 8 1969); *Yanish v. Barber*, 232 F.2d 939, 946-947 (CA 9 1956). See also 5A J. Moore Federal Practice § 52.06[2] n. 1 (2d ed. 1974).[4]

That rule was applied in *Kelley v. Southern Pacific Co.*, 419 U.S. 318. In that case, the court of appeals had ruled that the district court had applied an erroneous legal principle, and this Court agreed. But the court of appeals had proceeded to "render . . . judgment for respondent," and this Court "part[ed] company with the Court of Appeals on the propriety of a remand" (*id.* at 331), explaining that as the outcome under the correct legal standard depended upon a question of fact that the district court had not expressly decided, the case should be remanded to the district court "for further findings" (*id.* at 332). The Court indicated that the remand would not have been necessary had the record permitted only one

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[4] See also, *e.g.*, *Rule v. Intern. Ass'n. of Bridge Workers*, 568 F.2d 558, 568 (8th Cir. 1977); *Chicano Police Officer's Ass'n. v. Stover*, 552 F.2d 918, 921 (7th Cir. 1977); *Lee v. Beto*, 429 F.2d 524, 525 (5th Cir. 1970); *Southland Corp. v. Campbell*, 358 F.2d 333, 337-338 (5th Cir. 1966); *Wood Construction Co. v. Pool Construction Co.*, 314 F.2d 405, 406-407 (10th Cir. 1963); *Lundgren v. Freeman*, 307 F.2d 104, 114-115 (9th Cir. 1962); *Smithfield v. Home Insurance Company of New York*, 244 F.2d 337, 341 (9th Cir. 1957); *Hycon Manufacturing Co. v. H. Koch & Sons*, 219 F.2d 353, 355 (9th Cir. 1955). And see, generally, the innumerable cases cited in 5A Moore's Federal Practice, ¶ 52.06[2], n. 1 (2d Ed. 1981).

resolution of the factual issue, i.e. if "any [other] finding would have been clearly erroneous" (*id.* at 331).[5]

In the instant case, the record would permit a finding either way as to whether the 1941-42 transfer resulted from racial motivation on the part of IAM (USW Br. 46-47, 7a n. 3; see also Govt. Br. 24). Accordingly, the court below, upon determining this factual issue to be critical, overstepped its area of responsibility by resolving the issue itself without a remand.

3. The broader principle championed by respondents at R. Br. 144-146—that once a district court commits a single error of law the appellate court is free to redetermine *all* the facts in the case—would, if it were truly a rule of the Fifth Circuit,[6] be inconsistent with Rule 52(a) for the same reasons as is its rule that the appellate court is to independently determine questions of "ultimate fact" (USW Br. 33-38).[7]

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[5] *United States v. Parke Davis & Co.*, 362 U.S. 29, 44 and *United States v. General Motors*, 384 U.S. 127, 142, relied upon by respondents at R. Br. 137, are applications of this exception. In each case, this Court reversed on questions of law and was able to decide the case finally because the pertinent facts were "undisputed".

[6] Th Fifth Circuit's decisions suggest that the doctrine cited by respondents—that findings made under an erroneous view of the law "may not stand"—has a different office entirely, i.e. to define the fact-finding role of the district court following the remand necessitated by its legal error. See, e.g., *Williams v. United States*, 252 F.2d 887, 888 (5th Cir. 1958); *Ferran v. Flemming*, 293 F.2d 568, 571 (5th Cir. 1961); *United States v. Pickett's Food Service*, 360 F.2d 338, 341 (5th Cir. 1966).

[7] At one point in their brief, respondents assert that "the record presents a 'paper case' " and, therefore, apparently, that the court of appeals had greater freedom to explore the facts than it would have in a case involving live testimony. (R. Br. 146-147)

To begin with, this is far from being a paper case. The seniority system was a primary focus of all three trials in this case, and not merely the last trial, as respondents suggest. To be sure, the district court, after this Court's decision in *Teamsters v. United States*, 431 U.S. 324, granted respondents' motion for a limited new trial for "presentation of *additional* evidence relevant to the issue of

II. RESPONDENTS' ATTEMPT TO SECURE YET A THIRD INDEPENDENT FACT-FINDING AS TO THE MOTIVATION OF THE SENIORITY SYSTEM.

Part I—constituting the bulk—of respondents' brief attempts to demonstrate that as a matter of fact the seniority system in this case was badly motivated. It is written as if it were a brief to a district court. But this Court most assuredly did not grant certiorari to become the *third* court to make an independent determination of

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the validity of the seniority system under Section 703(h)" (App. 47a, emphasis added), and the one-day trial that ensued consisted largely of introduction of documentary evidence. But throughout the prior 18 days of trial the validity of the seniority system had been the principal issue in the case, and the parties had put before the district court voluminous testimony describing the origins and workings of the seniority system which underpinned the court's ultimate findings. The intimate familiarity with the seniority system that the district court had acquired by reason of the evidence introduced at the earlier trials is reflected in its decisions issued following the first and second trials (see, especially, App. 118a-145a, 49a-58a). Thus, while the dispositive issue had changed by reason of this Court's decision in *Teamsters*, the evidence introduced at the prior trials was relevant to, and relied upon by the district court, in resolving that issue. See, e.g., JA 36-41, 43-53, 56-64, 91-98.

Moreover, respondents in their brief repeatedly point to disputed in-court testimony, some of which the district court discredited, as support for their position that the seniority system was discriminatorily motivated. See, e.g., Resp. Br. 9, n. 7, 15, n. 19, 17-18, nn. 21, 22; compare *infra* at pp. 7-8, n. 8; JA 98.

But even if this were a "paper case", we are not certain what conclusion respondents believe would follow. Respondents acknowledge that the "clearly erroneous" rule applies to cases involving only documentary evidence. R. Br. 142, n. 101. That acknowledgment is required by "the clear language of rule, two notes of the Advisory Committee, and pointed expressions from the Supreme Court." 9 Wright and Miller, *Federal Practice and Procedure*, § 2587, p. 740 (1971). See *United States v. Gypsum Co.*, 333 U.S. 364, 394 (1948); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n. 9 (1963); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *Graver Mfg. Co. v. Linde Co.*, 339 U.S. 605, 609-610 (1950). See also the materials cited at USW Br. 33-34.

the facts in this case. Respondents therefore do not acknowledge that they are asking this Court to make an independent factual determination; this part of their brief is captioned "The Fifth Circuit Correctly Held That The Seniority System Was Intentionally Discriminatory" (R. Br. 64). But the Fifth Circuit's analysis of this case and its findings of fact go virtually unmentioned in the 72 pages that are subsumed under this caption. Instead, those pages contain an argument, based largely on "facts" nowhere mentioned by the Fifth Circuit, that on this record the weight of the evidence supports a finding that the seniority system was discriminatorily motivated. Implicit in respondents' method is the admission that the reasons given by the Fifth Circuit do not support its holding.

While resolution of factual issues is not the task of this Court, we feel compelled to state, lest respondents' assertions of fact be taken accurately to characterize this case, that respondents' recitation is replete with mischaracterizations of the record, and with inferences that are not warranted even from the record as thus erroneously portrayed. And, to assure that our claim in this regard is not taken as mere rhetoric, we focus on three of respondents' "factual" assertions to exemplify the extent of respondents' departure from the record and the findings below.

First, relying on two pages of testimony by a single witness (JA 97-98), respondents repeatedly assert as "fact" that prior to Title VII USW officials generally would not press "racial grievances," and that on one occasion in 1963 a USW official would not pursue a grievance challenging discriminatory application of the seniority system. (R. Br. 17 n. 22, 90, 108).[8] The

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[8] Although the witness' general charge was addressed to the performance of "*black* union officials" (JA 97, emphasis added), respondents put the blame on "*white* union officials" (R. Br. 90, emphasis added). The need for that transferrence is understandable,

district court expressly *discredited* this testimony, finding that there had *not* been discriminatory application of the seniority system (App. 28a), and that prior to Title VII the union had taken to arbitration and won a grievance establishing the right of blacks to exercise seniority to promote to white jobs (App. 41a; see also USW Br. 15, n. 29). Indeed, the district court found that the union was "not . . . dominated by whites" (App. 40a), "was one of the few institutions in the area which did not function in fact to foster and maintain segregation" (*id.*), and pursued "colorblind objectives" (App. 41a). The court of appeals recited and did not disturb these findings (App. 13a), and the court of appeals did *not* cite or indicate that it credited the contrary testimony cited to this Court by respondents. As the Government correctly states, "[t]he district court found . . . that the USW did not have a history of racial discrimination; the court of appeals did not appear to disagree with the district court's assessment of the USW's history . . ." (Govt. Br. 23). Respondents thus urge affirmance on the basis of a supposed "fact" that was discredited by both lower courts and that was not relied upon by the court of appeals in making the "finding" that respondents urge be affirmed.

Second, respondents in their brief place heavy reliance upon an alleged racial "disproportionality" in the departments—a phenomenon that they contend warrants an inference that the parties designed the seniority system with a purpose to discriminate against blacks (R. Br. 49-54, 113-118). That showing of "disproportionality" is based *entirely* on a statistical demonstration that respondents have constructed for the first time in this Court, one that perforce could not have been (and was not) a basis for the decision below. (Although not so acknowledged by

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for as respondents themselves acknowledge (R. Br. 19-20 and n. 23), and the record irrefutably shows (JA 209, 213, 216-220, 238), the witness' testimony is not credible: black union officials were from the start militant in pressing complaints of racial injustice.

respondents in their brief, the statistical demonstration that appears in Appendix B thereto was never introduced by them into evidence, nor was it even tendered to the court of appeals.) This would not be the place to tender new statistical analyses even if they were reliable. But respondents' analysis is hopelessly flawed: the numbers that appear in the tables deviate substantially from those in the sources from which they are purportedly drawn, the data relate to periods long after the seniority system was constructed and thus cannot bear on the motivation of those who constructed the system, the statistical methodology is fundamentally flawed, and, in any event, even if none of the above flaws were present, the results of the analysis would not be probative that the seniority system was negotiated with discriminatory purpose. We explain all this in a short appendix to this reply brief.

Third, respondents cite average wage figures for blacks and whites in USW's bargaining unit in 1973 ($4.14 for blacks, $4.45 for whites)—based, apparently, on complex arithmetic computations respondents have performed for the first time in this Court—to show that blacks were so disadvantageously located that an inference is compelled that the seniority system was designed for the purpose of "locking" black employees into inferior jobs (R. Br. 117). No such figures were presented to the court of appeals, nor did the court of appeals purport to rely on such "evidence" in finding discriminatory purpose. But even on respondents' figures, average black wages in USW's bargaining unit were 93% of average white wages, at a time when the average income of fully-employed black males in the South was only 58% that of fully-employed white males.[9] Given the inferior educa-

[9] U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 97, "Money Income in 1973 of Families and Persons in the United States," Table 56 (pp. 117-118) (GPO, 1975): mean figures for "Negro males, year-round full-time workers" in the South [$7,170] and for "white males, year-round full-time workers" in the South [$12,396]. The statistics for males are used be-

tions in segregated schools to which many of the black employees had been subjected (cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430),[10] the inability of blacks in the South to obtain training in the skilled trades (see *Steelworkers v. Weber*, 443 U.S. 193, 198) and the consequent inability of many of the black employees to qualify for the most highly-skilled and highly-paid jobs in USW's unit (App. 55a, n. 13), it is inevitable that no matter *what* seniority system were chosen there would remain *some* disparity between black and white earnings. The disparity respondents proffer is so small that, assuming its accuracy, it suggests that the seniority system here is *not* the cause of any economic disadvantage suffered by blacks, and thus tends to *refute* the inference that the parties could have designed the senority system *for the purpose of* visting such disadvantage.

III. THE GOVERNMENT'S POSITION

The Government takes a position markedly at odds with that of respondents. The Government recognizes that the court of appeals erred in overturning the district court's finding that USW's seniority system was not the product of discriminatory purpose, and accordingly erred in invalidating so much of USW's system as was untainted by the allegedly discriminatory motivation of the

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cause virtually all the employees in USW's bargaining unit were males (App. 70a). The comparable percentage *nationwide*, according to the same table, is 65%, $8,458 for blacks, $12,998 for whites.

[10] See *Board of Ed. of City of Bessemer v. United States*, reported *sub nom. United States v. Jefferson County Bd. of Ed.*, 372 F.2d 836 (5th Cir. 1966), *aff'd per curiam on petition for rehearing en banc*, 380 F.2d 385 (5th Cir. 1967), *motion for stay of execution denied*, 386 U.S. 1001; *United States v. Board of Ed. of City of Bessemer*, 396 F.2d 44 (5th Cir. 1968); *United States v. Jefferson County Bd. of Ed.*, 417 F.2d 834 (5th Cir. 1969); *Brown v. Board of Ed. of City of Bessemer*, 419 F.2d 1211 (5th Cir. 1970), *rev'd in part*, 396 U.S. 290; 429 F.2d 576 (5th Cir. 1970); 432 F.2d 21 (5th Cir. 1970); 446 F.2d 75 (5th Cir. 1971); 464 F.2d 382 (5th Cir. 1972).

IAM (Govt. Br. 9-11).[11] The Government recognizes also that there were two separate seniority systems at the plant (one negotiated by USW and the Company, applicable to jobs in the USW bargaining unit, the other negotiated by IAM and the Company, applicable to jobs in the IAM bargaining unit), and that this lawsuit attacked only USW's system (Govt. Br. 13-14, n. 7; see also, R. Br. 38 n.43). Nevertheless, says the Government, the district court erred in not determining IAM's motive in 1941-42 with respect to the transfer of the jobs of 24 black employees from the IAM unit to the USW unit. That was error, we are told, because that transfer *may* have adversely affected the seniority status of the occupants of those jobs, and *if* the transfer did so, and *if* the IAM was motivated by race (cf. Govt. Br. 24), it can be said that the disadvantage suffered by the occupants of those jobs by reason of the innocently-motivated USW seniority system was the product of IAM's discriminatory motive in transferring the jobs, and to that limited extent the USW seniority system is not protected by § 703(h) (Govt. Br. 13-15). We respond by first stating the relevant facts, by next describing what is at stake, and by then showing the plain error in the Government's position.

a. It is undisputed that in 1941-42, shortly after the NLRB's certification of separate IAM and USW bargaining units, the jobs then held by 24 black employees were transferred from the IAM unit to the USW unit, with the consent of all parties and the approval of the NLRB.

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[11] In this respect, the Government (at 9-10) expresses agreement with the point made in our opening brief (at 41 n. 43) that a court that finds only certain components of a seniority system discriminatorily motivated cannot invalidate the entire system. Section 703 (h) protects all employment decisions made pursuant to a seniority system except those that are "the result of an intention to discriminate because of race." And the congressional purpose in enacting § 703(h)—to protect the competitive seniority status of employees so long as that status is not the product of a racially-motivated seniority system—would be defeated if employees' competitive status that is not the product of discriminatory motivation were altered.

(Pullman Br. 5; R. Br. 31 n. 36). The transfer involved all 14 employees in the Truck Department, and 10 employees who were helpers in the Wheel & Axle Department. (R. Br. 31 n. 36; JA 247). The record does not indicate at whose initiative the transfer occurred—whether USW's, IAM's, or the affected employees.[12] Both courts below agreed that USW was motivated in agreeing to the transfer not by racial considerations but rather by its unwavering desire to expand its unit to include all employees in the plant regardless of race (App. 16a, 42a). The district court did not make a finding as to whether the transfer was the product of a desire by IAM to rid its unit of black employees, noting that the issue was contested but believing its resolution unnecessary (App. 42a); the Court of Appeals, disagreeing, did not remand for a finding by the district court, but instead proceeded to find on its own that the transfer resulted from racial motivation on the part of IAM (App. 15a)—a finding the Government says is *permitted* but that it concedes is not *compelled* by the record (Govt. Br. 24).[13]

(b) The Government recognizes that the transfer of the jobs even if badly motivated could have no significance

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[12] The record shows that the jobs in question were not craft jobs, and that USW was unhappy with—indeed moved for reconsideration of—the NLRB's decision placing them in the IAM unit (JA 292). The record also shows that IAM was unhappy with the placement of these jobs in its unit, albeit willing to "accept" them (JA 207). The record is silent as to the desires of the 24 employees.

[13] Elsewhere in its brief, the Government asserts that the court of appeals was "correct" in declaring that IAM was motivated by race (Govt. Br. 11) and that that court "properly concluded" that IAM was so motivated (Govt. Br. 15). We assume that the Government in those passages means only that it was not clearly erroneous on this record for the court of appeals to make that finding; otherwise, these statements cannot be reconciled with that at Govt. Br. 24. In any event, as explained in USW Br. 46-47, 7a-8a, n. 3, a finding that the transfer was the product of discriminatory motivation is *not* compelled on this record, nor is it the most likely finding in light of USW's persistent efforts to have jobs in the IAM unit, held by whites *and* blacks, transferred into the USW unit.

to the validity of USW's seniority system unless the transfer altered the seniority rights of the occupants of the jobs, i.e. unless they were somehow "prejudiced" (Govt. Br. 14 n. 7). On that issue, the Government implicitly concedes that the transfer did not affect those employees' access to other jobs in the IAM unit; as the IAM had occupational seniority, those in a particular job in the IAM unit had no greater claim to other jobs in that unit than did employees in the USW unit (USW Br. 7a, n. 2; Govt. Br. 14 n. 7). But the Government suggests the *possibility*—conceding that a remand for "clarification" would be necessary to verify the possibility (Govt. Br. 14 n. 7)—that the transfer might have had a different (quite minor) seniority impact: assuming that one of these employees *were* able to secure a *different* job in the IAM unit, the USW agreement is clear that the employee by transferring to that job would forfeit his seniority in the former job, while the IAM agreement is silent as to whether a transferring employee from within the IAM unit forfeits his seniority in the former job (*ibid.*); thus, it is possible (subject to "clarification" on remand as to the meaning of the IAM agreement) that had these jobs remained in the IAM unit, the occupants would have had a seniority right upon obtaining a different job in the IAM unit that they did not enjoy in the USW unit: to return to their former job if, having attained this different job in the IAM unit, they were laid-off from that job.

In sum, the Government's contention that the USW seniority system is not protected by § 703(h) "to the extent the system was affected by the IAM's discriminatory maneuvers" (Govt. Br. 11) would, even if its factual predicates were proved, potentially affect a handful of employees and then only in the most speculative manner.

(c) The record shows that even if the jobs of the 24 employees had not been transferred to the USW unit in 1941-42, the jobs would have been transferred to the USW unit in 1944 for reasons that indisputably had nothing to do with race. As recounted at USW Br. 25,

n.39(3), USW's unwavering quest to bring all jobs into its bargaining unit bore fruit in 1944, when USW gained the support of a majority of the employees in the IAM unit. In that year, *all* of the non-craft jobs in the IAM unit (and some of the craft jobs as well) were ceded by IAM to USW, including all jobs in the Wheel & Axle Department that had not already been transferred in 1941-42; USW left to IAM only the jobs of certain "scabs" (all white) who had crossed USW's picket lines and whom USW therefore did not wish to represent. (Pullman Br. 6-7; USW Br. 25, n. 39(3), 46-47).

This subsequent event drains of all significance the motivation for the 1941-42 transfer. At most (i.e. even if it could be shown that the earlier transfer had been at IAM's instance and had been motivated by race), the victims of that transfer suffered an act of discrimination the effects of which ended in 1944, when their jobs would have been transferred to USW's unit in any event for reasons unrelated to race. That discrimination, which pre-dated enactment of Title VII by two decades, is not itself actionable under Title VII. Only if that discrimination were being perpetuated *after 1965* by the seniority system then in effect could there be a basis for inquiry under Title VII. But as the jobs in question would have been in the USW unit from 1944 forward anyway, for reasons unrelated to race, and as those jobs were treated equally with all others for seniority purposes under USW's agreements—a seniority system the Government concedes was properly found to have been negotiated without discriminatory purpose—USW's seniority system is not perpetuating the discrimination that arguably occurred until 1944. In this respect, the racial neutrality of USW's seniority system is indisputable: the majority of those whose jobs were transferred from the IAM unit to the USW unit were white,[14] and all were subjected to the single seniority

[14] All told, as a result of the 1941-42 and 1944 transfers, 96 whites and 28 blacks were transferred from the IAM unit to the USW unit (USW Br. 46-47, 5a, 7a n. 3).

disadvantage about which the Government complains (inability to preserve seniority on a USW-unit job when transferring to a job in the IAM unit.)[15]

IV. THE "JAMES" FACTORS

This Court has made plain that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Trans World Airlines, Inc., v. Hardison*, 432 U.S. 63, 82. The "four factor" test first articulated by the Fifth Circuit in *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, and relied on here by the Government and the respondents, constitutes the rigid methodology that court has imposed upon district courts in its Circuit for determining the answer in every case to the factual question whether "a discriminatory purpose" exists. That approach is an invitation to error, not enlightenment.

Divining an answer to the question whether the parties to a seniority system were actuated by a discriminatory purpose will not always be easy. For that reason, we do not share the confidence of others before this Court that a grand *schema* can be developed that will provide *the* method for eliciting that answer in every case. By listing certain items of evidence that may have probative value

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[15] Even apart from this dispositive consideration which the Government overlooked, its own thesis would have required a remand to the district court for further fact-finding, rather than the partial affirmance it urges (Govt. Br. 30), for as we have shown, its thesis depends entirely upon two subsidiary facts as to which the district court had made no finding, and both of which the Government concedes could be found either way: the motivation underlying the 1941-42 transfer (Govt. Br. 24; see also USW Br. 46-47, 7a-8a, n. 3), and a determination whether occupants of the jobs in question would have had any greater seniority rights had their jobs remained in the IAM unit than they enjoyed in the USW unit (Govt. Br. 14 n. 7; see pp. 12-13, *supra*).

and not others that may be *more* probative, *James* artificially restricts the inquiry. The result here was that the court below—once it assumed the role of appellate fact-finder—concluded that the seniority system was invalid *without even considering* other evidence that powerfully suggested innocent motivation.

Here, the district court found, *inter alia*, that: blacks participated equally with whites in negotiating the system, the contemporaneous minutes of the negotiating process reveal no discriminatory purpose, blacks participated equally with whites in voting whether to approve the system negotiated, these votes did not divide along racial lines, blacks opposed some of the very changes in the seniority system that respondents contend would have been adopted had the parties not been racially motivated, and the system was the product of the desires of a union that pursued colorblind objectives. While the court below did not disturb these findings, at the critical point in its analysis these findings simply were ignored. The outcome was made to turn exclusively upon the *James* factors—factors that in this case were less reliable indicators of the purpose underlying the seniority system. The result was a "finding" that does not comport with the natural inference to be drawn from the totality of the facts.

With that general preface, we offer some observations about the intrinsic probative worth of the three items of evidence to which *James* directs particular attention.

1. Evidence that other forms of discrimination in the workplace were practiced at the time the seniority system was adopted is, as the district court recognized (App. 39a), double-edged. Depending upon the circumstances, it may be powerful evidence *rebutting* an inference of discriminatory purpose, rather than *supporting* such an inference. This is particularly so in the case of southern plants. Prior to 1965, it was not thought to be unlawful for private parties to engage in *overt* racial discrimination, and in the South particularly such

overt discrimination was commonplace. The social system was largely one of open discrimination openly arrived at. Those who wished to keep blacks out of "white" jobs had and used a straightforward means—a simple declaration that those jobs were "off-limits" to blacks. In the climate of that era and locale, it is far more likely than not that parties seeking to accomplish discrimination in their seniority system would construct an openly discriminatory system, not a facially neutral system. There was no need, actual or perceived, for careful deceptions. Those who openly assigned badge numbers, lockers, wage rates and jobs on the basis of race would not likely have been reluctant to be equally as open in assigning seniority rights on the basis of race.

Conversely, when, prior to 1965, parties in the South *did* construct seniority systems under which blacks were given the right to bid for "white" jobs—a right nowhere provided for in law or custom and not normally then accorded—it is unlikely that such neutral seniority components as might "discourage" the exercise of that right were motivated by race; if such discouragement was the parties' object they would not have created the right at all.

Moreover, certain types of seniority systems—e.g. those that made seniority applicable only to layoffs and recalls—simply *could not* have been motivated by race when adopted in plants where the employer practiced rigid job segregation. For in those situations seniority effectively determined only the rules by which whites competed against whites, and blacks against blacks; race was irrelevant to the operation of such systems, and thus could not have influenced their design.[16]

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[16] That is, in fact, precisely what happened in the instant case. Until 1956, when USW finally succeeded in its long-standing quest to secure the application of seniority to promotions, seniority was applicable only to layoffs and recalls (USW Br. 14 and n. 27). During that period, as the Company assigned blacks only to "black"

2. That a seniority system does not conform to others in its industry may or may not invite suspicion as to its underlying motivation. Of course, that a seniority system *conforms* to industry practice, where the industry includes plants with few or no blacks at which race could not have been a motivating factor, would seem powerful evidence of its innocent motivation.[17] But this Court has

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jobs, and whites only to "white" jobs, the seniority system regulated only the competition of blacks against blacks and whites against whites (*id.* at 18a). Yet it is during that period that all of the choices challenged here respecting the seniority system were made—both as to the measure of seniority and as to the units (departments) within which seniority would be exercised. As these choices had no racial consequences at the time they were made, it is irrational to infer that they were motivated by racial considerations. When, in 1956, the union finally succeeded in its quest to make seniority applicable to promotions—a success that under the system as it had previously been constructed invested, *inter alia*, blacks with the right to exercise seniority to bid to white jobs (USW Br. 14-15 and n. 28)—no change whatever was made in any other aspect of the system. The choices challenged in this case thus were made at a time when they had no racial consequences, and were not altered one iota when they *did* begin to have racial consequences.

[17] Indeed, even if the rare case could be imagined in which the court found from other particularized evidence that racial motivation entered into the parties' adoption of the same system as was in use throughout their industry including at virtually all-white plants, the court would be required to determine, if so requested by defendants, whether they had proved that the same system would have been adopted even had race not been considered. As explained in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 270-271 n. 21:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.

recognized that diversity in seniority systems is the norm, *California Brewers Association v. Bryant*, 444 U.S. 598, 608, and the degree of suspicion due a deviation from industry practice should depend upon the persuasiveness (and credibility) of such innocent explanations as are offered for the deviation.

3. The question being one of intent, the weight warranted by evidence of disparate impact will vary from case to case. Section 703(h) does not come into play at all unless the seniority system has disparate impact (i.e. unless the employer engaged in pre-Act discrimination that continues to manifest itself in the location of the victims of that discrimination within his workforce). Where there has been such pre-Act discrimination, *any* traditional seniority system, no matter how innocently motivated, will produce *some* disparate impact. The degree of impact will inevitably reflect the degree of assignment discrimination that had occurred, and not necessarily the intention of those who created the seniority system. Thus, placing undo reliance upon evidence of impact as indicative of intent may well undermine § 703 (h) as interpreted in *Teamsters*. Moreover, where the evidence shows that the system disadvantageously affects a significant number of whites, the evidentiary worth of disparate impact—secondary at best—is further diminished. Parties whose purpose was to injure blacks would not likely have shaped their system to injure substantial numbers of whites as well. Thus, for example, proof that a system "locks" 60% of the blacks but only 40% of the whites into disadvantageous positions might establish disparate impact, but it would hardly be probative of discriminatory intent.

CONCLUSION

The decision of the Fifth Circuit should be reversed and the case remanded with an instruction to that court to affirm the judgment of the district court that the seniority system does not violate Title VII.

Respectfully submitted,

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APPENDIX

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DEFECTS IN RESPONDENTS' STATISTICAL ANALYSIS TENDERED IN APPENDIX B TO THEIR BRIEF

Had respondents sought to introduce the tables in Appendix B into evidence in the district court, USW would have been able to make a record demonstrating the arithmetical errors in the construction of those tables, and through the testimony of a statistical expert to show that the tables do not in any event prove the point for which they are proffered. This Court's rules contain no procedure by which exhibits "moved into evidence" at *this* level may be impeached. Accordingly, we undertake here to describe the most glaring defects in respondents' attempted showing.[1]

1. The critical choices respecting the seniority system whose motivation respondents challenge all were made between 1941 and 1954 (R. Br. 37; App. 3a, 26a). Yet respondents' proffered statistics relate to the distribution of employees in 1956 and 1964. Obviously, parties in making decisions between 1941 and 1954 could not have been motivated by distributions of employees that did not then exist.[2] The use of data from an inapposite period cannot

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[1] What follows is derived in some part from expert advice transmitted to counsel by a renowned expert in statistics who is experienced, *inter alia*, in the analysis of statistics in Title VII cases. That expert is Dr. Samuel S. Shapiro, professor and Chairperson of the Department of Mathematical Sciences, Florida International University.

[2] Respondents suggest that they chose to analyze data for 1956 because that was "the date when the seniority system had fully evolved" (P. Br. 52). But the only seniority event in 1956 was the decision to make seniority applicable to promotions—a decision that respondents do not challenge and that plainly was *not* discrimi-

even be explained on the basis that data from more pertinent periods were unavailable; the record contains sources from which the departmental distributions can be determined for 1941 (JA 103), and for each year from 1947 through 1954 (P. Exs. 2-9 (1978 Trial)). Nor is there reason to assume that what was true in the later years analyzed by respondents necessarily was true in the years in which the critical seniority choices were made. Respondents' own purported findings are that the degree of "disproportionality" increased significantly between 1956 and 1964 (R. Br. 51-52); if anything can be "inferred" from that trend, it is that the choice of earlier (and more relevant) years would have reflected less "disproportionality." In this respect, it is useful to note as examples that the Paint Department, found by respondents to be "disproportionally white" in 1956 (R. Br. App. B, Table 2), mirrored the relative black-white ratio in the plant almost precisely in 1941 (JA 103), and that the Punch & Shear Department, also found by respondents to be "disproportionally white" in 1956 (Table 2), had an entirely different racial composition in 1941, with blacks exceeding their ratio in the plant as a whole (JA 103).

2. If statistical analyses are to have any credibility at all, they must begin with accurate raw numbers. Respondents, however, have produced tables whose raw numbers deviate substantially from the data in the

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natorily motivated, as it created for the first time a right for black employees to promote to "white" jobs (USW Br. 14-15 and n. 28). The irrelevancy of respondents' whole endeavor is reflected in the perception that on respondents' thesis the 1956 data would warrant an inference of discriminatory motivation in the seniority decision made that year, i.e. that in deciding to provide blacks seniority access to formerly "white" jobs the parties were motivated by racial hostility.

Respondents offer no explanation as to the relevance of data for 1964, which is literally a decade after the last seniority choice was made that is challenged as discriminatory.

"sources" from which they are claimed to have been derived. This is most readily apparent from Table 1, whose raw numbers (said to be derived from P. Ex. 2 (1974 Trial), see R. Br. App. B, p. 7) indicate that in 1964 there were 3,875 employees in the plant of whom nearly two-thirds were white. We have conducted an independent tabulation from that same "source", and have found that what it actually shows is almost precisely what the district court *found* that it shows when that court undertook a similar tabulation using the same data source (App. 128a): that there were less than 2400 employees in the plant, of whom only approximately one-half were white.[3] That the counts conducted by the district court and by us are correct, and respondents' wrong, is independently confirmed by the exhibit at JA 90, which shows that at no time in 1964 did the plant population exceed 2400 employees (indeed, at no time in modern history did it exceed 2800); by the findings of both courts below that 2800 was as high as the plant population ever rose (App. 68a, 128a); and by the finding of the court of appeals that "Pullman's work force, depending upon the time selected, ranges from forty-five to almost fifty percent black" (App. 4a), a finding consistent with that of the district court (App. 120a, and n.10).

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[3] The biggest error in respondents' arithmetic—albeit by no means the only one—is the "discovery" of approximately 1,000 more whites in the Welding Department than appear on the source exhibit (cf. Respondents' Table 1 with App. 128a). We have considered the possibility that respondents despite their stated purpose in conducting the count to "reflect[] the employment composition at the plant on" a given "date", R. Br. 51 n. 59, mistakenly counted everyone on the source exhibit irrespective of when he was shown as employed (the source exhibit includes persons who worked in each department at *any* time during a 13-month period, and this is a methodological error that respondents had made before (1974 R. 722-725)). But even that cannot explain the figures on respondents' Table 1 for the Welding Department, which by that hypothesis would still show 636 more whites than appear in the source exhibit, albeit 30 less blacks than appear therein.

This error in raw numbers[4] is doubly fatal to the credibility of respondents' statistical analysis. In the first place, it is self-evident that if respondents have not accurately reported the number of white and black employees in a department, statistical calculations made on incorrect raw numbers will produce incorrect conclusions. Secondly, as respondents have proceeded on the assumption that the plant was two-thirds white, when in fact it was only one-half white, they have produced a meaningless result: they have tested to determine in which departments the populations deviated "significantly" from an "expected" ratio of two-thirds white; but the results of those tests can hardly be probative of anything in a plant that was only one-half white.

3. Respondents' approach contains a methodological flaw commonly committed when laymen undertake statistical analyses: respondents have proceeded on the incorrect assumption that the racial distribution in each department is a result independent of the racial distribution in each other department, i.e. they have tested the black-white ratio in each department against the black-white ratio in the plant as a whole. But as the number of blacks and whites in the total workforce is fixed, a disproportion in a single department will mean that the "expected" ratio of assignments of all other employees among the remaining departments would change, for the "pool" of black and white employees distributed among the remaining departments would not have the same black-white ratio as the total plant population. Thus, if the number of blacks in one department is disproportionately high, the "expected" number of blacks in all other departments should be lower. But under respondents' erroneous methodology, the finding of a department with a significantly high

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[4] The same defect inheres in Respondents' Table 3, which contains virtually the same erroneous numbers as Table 1.

number of blacks does not alter the "expected" number in the other departments, and thus inevitably creates the probability that other departments will be found to have a significantly low number; if one or two departments have an extreme racial disproportion, a number of other departments might erroneously appear, under respondents' methodology, to have the opposite disproportion. There are statistical procedures to control for the interdependence of the racial distributions in each department, but respondents did not employ such procedures. In consequence, respondents' purported "findings" result from a flawed statistical analysis. And, significantly, the effects of respondents' methodological error run only in one direction: the error is bound to *increase* the *apparent* extent of racial disproportionality beyond that which would result were proper statistical methods used.

4. We have thus far discussed respondents' analysis as though it had something to do with the lone factual issue posed in this case—the motivation underlying the seniority system—simply to show the errors in methodology and application. In fact, however, respondents' statistical analysis, even if properly done, would be meaningless as a basis for drawing inferences as to the motivation of the seniority system.

There is more to statistics than the mechanical application of statistical tests to data. First and foremost, the appropriate use of statistical procedures requires that the tests employed be addressed to the question for which an answer is being sought. Whether certain data reveal a pattern that is "statistically significant" may depend entirely on what question is being asked. In their brief, respondents describe their statistical analysis as establishing which departments at the Pullman-Standard Bessemer plant are "racially identifiable departments". R. Br. at 50, and n.58. But the analysis they have employed is not a basis for any such conclusion.

As is accurately stated in the "Methodology" section of Appendix B, the statistical analysis performed in Tables 1 and 2 does no more than test the hypothesis that the "decisions [assigning employees to the various departments] were made randomly with respect to race," App. B at pp. 1, 3—in other words, the hypothesis tested by the statistical analysis employed is that race played no part in the assignment of employees to the various departments. But no party to this case disputes that race in fact did play a part in job assignments made prior to the 1956 and 1964 dates that the tables focus on. The statistical analysis employed by respondents is thus directed at a question that has already been answered. It is not directed, however, at the question of which departments are "racially identifiable."

Depending on the size of the population studied, the hypothesis that race played no part in a process may be negated by the slightest difference between the proportion of blacks expected to emerge from the process and the proportion of blacks that actually does emerge. Thus, there may be a finding of "statistical significance" when the actual proportional differences would not be discernable to laymen upon normal observation. It is wrong to link the phrase "racially identifiable" to a finding of "statistical significance" that merely negates the hypothesis that race played no part in a process.

Further, by attempting to make that very linkage, respondents end up with a definition of "racially identifiable departments" that makes no sense in a case such as this, where the issue is the motivation underlying the seniority system, not the validity of the assignment process. Thus, respondents' analysis leads them to label several departments in Table 1 as identifiable "black" departments even though a majority of the employees in the departments were white: Forge Department (53 whites; 42 blacks); Paint & Shipping Department (143 whites, 129 blacks); Wood Erection Department (90

whites; 73 blacks). Manifestly, that the seniority system "locks" employees into these departments could not be probative of anti-black motivation. More generally, as the parties who negotiated the seniority system did not perform statistical analyses but at most had a knowledge of the numbers of blacks and whites in each department, it is wrong to employ statistics at all to assess their motivations. The only "fact" from which any inference conceivably could be drawn is the "fact" of the actual numbers of whites and blacks in each department at the time seniority choices were made. If an inference of discriminatory motivation could not be drawn from *that* "fact" (i.e. from the information the parties might conceivably have possessed when they negotiated) the gap cannot be closed by generating abstract data that were *not* known to the parties when they made seniority choices.

That respondents' analysis is misdirected is illustrated by applying it to the facts of *Teamsters*. If respondents had performed their statistical analysis upon the data in *Teamsters*, and done it properly, they would have found that there was "serious disproportionality" in both the city driver and line driver units, i.e. that *100%* of the employees were in "racially identifiable departments." Under respondents' analysis, that result would be the most conclusive indicator of discriminatory intent that the analysis could produce. But it would fly in the face of what was intuitively obvious in *Teamsters*: that an inference of bad motive could not be drawn from the relative numbers of blacks and whites in the units in operation there. This example—as well as that furnished *supra*, 1a-2a, n. 2—shows that respondents' exercise is not designed to produce a result relevant to the question of discriminatory purpose.